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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055259
Party	Defendant Conagra Grocery Products Company, LLC
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STRATEGIC MARKS, LLC, Petitioner, v. CONAGRA GROCERY PRODUCTS COMPANY, LLC, Registrant.	)	Cancellation No. 92055259 U.S. Reg. No. 3,135,751 Mark: SCREAMING ZEBRA ZONKERS!

REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION TO RE-OPEN DISCOVERY AND RESET TRIAL DATES

Registrant Grocery Products Company, LLC ("ConAgra" or "Registrant"), by and through its undersigned attorneys and pursuant to 37 C.F.R. §2.127(a), files its Brief in opposition to Petitioner Strategic Marks, LLC ("Petitioner")'s Motion to Reopen Discovery and Reset Trial Dates.

INTRODUCTION

Just as in its companion cancellation proceeding no. 92053610, Petitioner served no discovery in this matter—despite having nearly six (6) months to do so. Petitioner similarly did not timely move the Board to extend the discovery period, despite counsel's entry in this matter over two weeks before the close of discovery [dkt. 5], and despite counsel's admission before discovery closed that an extension was necessary. Instead, Petitioner waited until over three weeks after the discovery period closed before filing the present Motion, wherein Petitioner asks the Board to re-open discovery and reset the existing trial dates. As more fully discussed below, Petitioner's Motion wholly fails to demonstrate excusable neglect. Since such a showing is required to support the grant of Petitioner's Motion, the present Motion should be denied.

ARGUMENT AND AUTHORITIES

I. LEGAL STANDARD

The present Motion imposes on Petitioner the burden to establish that its failure to act in a timely manner was the result of excusable neglect. *See Vital Pharmaceuticals, Inc. v. Kronholm*, 99 U.S.P.Q.2d 1708, 1710 n. 10 (TTAB 2011). Petitioner concedes as much in its brief. (*See* Motion [Dkt. 7], at p. 3.) In construing the applicable standard the Supreme Court has held that whether "excusable neglect" exists depends on analysis of four factors: (1) the danger of prejudice to the non-movant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 395 (1993).

However, "[t]hese factors do not carry equal weight." *Vital Pharma.*, 99 U.S.P.Q. at 1710. To the contrary, the Board has noted on numerous occasions (and other courts have agreed), that the third *Pioneer* factor—the reason for the delay and whether it was within the movant's reasonable control—is the most important factor. *Id.*; *see also Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1586 n. 7 (TTAB 1997)(and cases cited therein). For this reason, the Board has regularly found excusable neglect lacking where a movant fails to show that anyone other than the party and its counsel are responsible for the party's inability to "properly docket and/or call up the case for proper and timely action." *Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1587; *Vital Pharmaceuticals*, 99 U.S.P.Q.2d at 1711; *see also Vital Pharm.*, 99 U.S.P.Q.2d at 1711 (finding that a party's "reasons for not actively participating in this case fail to establish excusable neglect").

To be clear, a mere two days before Petitioner filed its current Motion the TTAB issued its precedential opinion in *Luster Products Inc. v. Van Zandt*, 104 U.S.P.Q.2d 1877 (TTAB Nov. 28, 2012), where the Board rejected an indistinguishable request to re-open discovery. *See Luster*, 104 U.S.P.Q.2d at 1878 (denying motion to re-open where party provided no explanation for waiting until weeks after the close of discovery to seek to reopen discovery"). Tellingly, Petitioner's Motion fails to even acknowledge the *Luster Products* decision. Simply stated, this controlling precedent compels the same result here.

II. PETITIONER CANNOT ESTABLISH EXCUSABLE NEGLECT

A. The Third *Pioneer* Factor Weighs Heavily Against Petitioner

As noted above, the Board has repeatedly held that the reason for the delay, including whether it was within the reasonable control of the movant, is the decisive factor in determining whether "excusable neglect" exists. *See Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1587; *Vital Pharmaceuticals*, 99 U.S.P.Q.2d at 1710. Misunderstandings of the rules do not constitute excusable neglect. *See PolyJohn Enterprises Corp. v. 1-800-Toilets, Inc.*, 61 U.S.P.Q.2d 1860, 1862 (denying motion to reopen discovery); *see also Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1585 (inadvertence, ignorance of the rules and mistakes construing the rules do not constitute 'excusable' neglect). Moreover, excusable neglect cannot be found where the reasons relied upon for a party's failure to act were within the party's reasonable control. *Vital Pharm.*, 99 U.S.P.Q.2d at 1710; *Luster Products*, 104 U.S.P.Q.2d at 1880.

There can be no dispute that this factor weighs heavily against a finding of excusable neglect here. Petitioner offers no competent explanation for why it did not act prior to the close of discovery. As noted above, it is undisputed that Petitioner had nearly six months to do so. "[A] party must be held accountable for the acts and omissions of its chosen counsel, such that,

for purposes of making the 'excusable neglect' determination, it is irrelevant that the failure to take the required action was the result of the party's counsel's neglect and not the neglect of the party itself." *Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1586. The Board has also explicitly rejected the argument that Petitioner could not have undertaken discovery prior to receiving Registrant's Initial Disclosures. *See Luster Products*, 104 U.S.P.Q.2d at 1879. If Petitioner perceived that ConAgra's Initial Disclosures were necessary, it was incumbent on Petitioner to file a Motion to Compel. *See Id*. at 1878-79. Having failed to do so here, Petitioner cannot be heard to complain on this issue.[1] Simply stated, Petitioner offers no explanation for why it was unable to undertake any necessary discovery during the five plus months previously afforded for such purposes. (*See* Order [Dkt. 11], at p. 7.)

Moreover, Petitioner's briefing and supporting papers equally provide no competent reason for Petitioner's failure to timely bring this Motion. In its supporting Declaration Petitioner claims that sometime in "October, 2012" the KB Ash Law Group agreed to represent Petitioner in this proceeding, yet Petitioner provides no date when this representation allegedly began. (*See* Motion [Dkt. 7], at Ex. C ¶6.) Petitioner's counsel admits that it appeared in this action over two weeks before the close of discovery, *see* [dkt. 7], at p. 2 (emphasis added), yet provides no reason why counsel did not serve discovery requests then, or alternatively move the Board to extend the time for taking discovery despite counsel's awareness that such an extension was necessary. (*See* Motion [Dkt. 7], at Ex. F.) Instead, Petitioner waited over three weeks—until November 30, 2012—to move the Board to re-open discovery. To the extent Petitioner

[1] It is equally disingenuous for Petitioner to suggest (again without support of any kind) that prejudice is lacking here merely because ConAgra purportedly "did not express any objection to providing Respondent's Initial Disclosures close to the end of discovery." (*See* Motion to Re-Open [Dkt. 7], at p. 3.) There is simply no support for Petitioner's claim, and in fact the Board has rejected similar baseless arguments. *See Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1587 n. 12 (rejecting claim that there was an "absence of prejudice" simply because adversary did not file a motion to dismiss the opposition).

claims that it could not have acted while searching for alternate counsel, it is undisputed that Petitioner failed to file any paper asking the Board to suspend these proceedings while it endeavored to obtain new counsel. Petitioner surely could have done so, as evidenced by the fact that Petitioner has previously filed papers on its own behalf before the Board. (*See* Feb. 10, 2011, filing in Cancellation No. 92,054,610 [Dkt. 1].) For these reasons, Petitioner's suggestion in the present Motion that filing a *pro se* motion to suspend would be tantamount to "forfeiture" is simply not supported by the facts.

B. The Second *Pioneer* Factor Equally Weighs Against Petitioner

Because Petitioner provides no credible explanation for not moving to re-open discovery until over three weeks after the close of discovery, the second *Pioneer* factor also weighs strongly against Petitioner. Any claim to the contrary by Petitioner ignores the Board's finding that significant delay results from a party's failure to act until weeks after the close of the discovery period. *See Luster Products*, 104 U.S.P.Q.2d at 1880. Moreover, it is equally plain that the true extent of Petitioner's delay must necessarily include "the additional, unavoidable delay arising from the time required for briefing and deciding" motions such as this. *See Luster Products Inc.*, 104 U.S.P.Q.2d at 1880. There is thus no support for Petitioner's claim that the delay here is not "meaningful." (*See* Motion to Re-Open [Dkt. 7], at p. 4 ¶3.) To the contrary, "the Board is . . . justified in enforcing procedural deadlines." *PolyJohn Ent. Corp.*, 61 U.S.P.Q.2d at 1862 (denying motion to re-open and granting motion to dismiss petition to cancel). "The Board's interest in deterring such sloppy practice weighs heavily against a finding of excusable neglect, under the second *Pioneer* factor." *Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1588 (TTAB 1997)(denying motion to reopen). Petitioner cites no authority to the contrary, and this factor squarely weighs against granting Petitioner's Motion.

C. The Remaining *Pioneer* Factors Do Not Outweigh The Above Factors

Prejudice to Registrant under the first *Pioneer* factor equally weighs against Petitioner. Although Petitioner maintains that prejudice is lacking for no other reason than because discovery closed allegedly "less than one and one-half months ago," [dkt. 7], at p. 3 ¶2, Petitioner fails to offer any explanation why its Motion should not be denied based on the Board's binding *Luster Products* precedent. *See Luster Products*, 104 U.S.P.Q.2d at 1880 (finding that comparable delay of weeks was significant and warranted denial of motion).

The fourth *Pioneer* factor equally supports denial of Petitioner's Motion. To this end, Petitioner's Declaration asserts that he retained the law firm of Raj Abhyanker, P.C. "[o]n or about February, 2012," (*see* Motion [Dkt. 15], at Ex. A ¶2). However, such claim is belied by the fact that counsel previously filed a Motion on behalf of Petitioner in similar litigation lodged against Registrant *nine months prior, on May 24, 2011*. (*See* Petitioner's Motion for Relief in Cancellation No. 92053610 [Dkt. 8], at p. 6.) Similarly, as noted above, Petitioner's declaration is conspicuously silent on when in October current counsel was actually retained in this matter. (*See* Motion [Dkt. 7], at Ex. C ¶6.) In short, Petitioner's false and/or equivocal factual assertions demonstrate an utter absence of good faith in bringing the present Motion. However, it bears note that case-law has repeatedly held that motions of this kind are properly denied even in the absence of evidence demonstrating bad faith. *See Luster*, 104 U.S.P.Q.2d at1880 (finding that failure to timely act was not result of excusable neglect, despite "no evidence of bad faith on the part of applicant"); *PolyJohn Enterprises Corp.*, 61 U.S.P.Q.2d at 1862 (same); *Vital Pharmaceuticals*, 99 U.S.P.Q.2d at 1711.

Finally, Petitioner's suggestion that other "relevant circumstances" warrant grant of its Motion is equally unfounded. Petitioner highlights that no discovery has been conducted, yet

omits that as the party who brought this action *Petitioner* had the burden of prosecuting its case. *See Vital Pharmaceuticals*, 99 U.S.P.Q.2d 1708, at 1711. Petitioner cites no reason, nor any authority that would obligate Registrant to undertake expensive discovery in this proceeding where Petitioner itself has refused to undertake any discovery necessary to substantiate its claims. Again, any unsupported suggestion by Petitioner that Registrant somehow did not meet its discovery obligations is belied by the fact that Petitioner has failed to file any Motion to Compel in this proceeding. *Luster Products*, 104 U.S.P.Q.2d at 1879. Finally, Petitioner cites to nothing more than a hearsay Wikipedia page to support its baseless assertion that Petitioner's claims purportedly "appear to have merit." (*See* Motion [Dkt. 7], at Ex. G.) Courts have regularly criticized "Wikipedia's lack of reliability." *See, e.g., United States v. Lawson*, 677 F. 3d 629, 650-51 (4th Cir. 2012)(citing cases). More troubling, even this inadmissible hearsay document fails to provide any of the cited sources purportedly supporting the statements contained therein. (*Id.*) As a result, Petitioner fails to offer any admissible evidence to support its claimed assertion. (*See* Motion [Dkt. 7], at p. 5 ¶9.)

In sum, none of Petitioner's alleged "relevant circumstances" warrant grant of Petitioner's Motion in the absence of excusable neglect. The relevant *Pioneer* factors discussed more fully above abundantly demonstrate that Petitioner's failure to undertake necessary discovery was due exclusively to the failings of Petitioner and its counsel, all of which were within Petitioner's reasonable control. The protracted delay, continued prejudice to ConAgra, and bad faith in bringing the present Motion equally support denial of Petitioner's Motion.

CONCLUSION

For the foregoing reasons, Petitioner's Motion wholly fails to provide any support demonstrating excusable neglect. The Board should accordingly deny Petitioner's Motion.

DATED: December 17, 2012

CONAGRA FOODS RDM, INC.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing was served via electronic mail on this 17th day of December, 2012 upon:

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